U.S. Department of the Interior
National Park Service
Cultural Resources • Archeological Assistance

LEGAL BACKGROUND of ARCHEOLOGICAL RESOURCES PROTECTION

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Technical Brief No. 11
June 1991

This Technical Brief describes the legal background and case histories for archeological protection. Its purpose is to provide a convenient summary of archeological protection and preservation as an issue in law and jurisprudence that will be of use to jurists who may need assistance in casework.

Portions of this technical brief depart from the standard format for reference citations, i.e., American Antiquity style, in favor of endnotes and legal usages, standard legal citation format, which are more helpful to attorneys and judges. Also, the standardized Federal government spelling of 'archeology' is used throughout, except in titles and direct references to the Archaeological Resources Protection Act where it is spelled 'archaeology.'

Introduction

Despite a variety of Federal, Tribal, State and even local laws passed over the last 85 years, the amount of looting and vandalism of irreplaceable archeological resources continues to increase. Archeological sites are located on both public and private lands. Many of the sites are remote and difficult to patrol,[1] although considerable numbers of archeological sites are also to be found in more densely populated areas such as New England, the Midwest, Southeast, and the West Coast.

This technical brief examines: (1) the current profile of civil and criminal actions brought since passage of the Archaeological Resources Protection Act (ARPA);[2] (2) the potential areas of application for ARPA; (3) other laws and regulations that afford protection to archeological resources; and (4) case patterns through an overview of LOOT information currently available.

History and Purpose

Statutes Prior to ARPA

Federal preservation law dates from the early 19th century, when its primary focus was to document information and collect items of importance in connection with national public figures and historic military events.[3] The extended efforts beginning in the mid-19th century to save George Washington's home, Mt. Vernon, and protect the archeological remains and monumental architecture of Southwest sites such as Casa Grande Ruins exemplify such early preservation measures, most of which resulted in cases involving the taking of public property for preservation or beautification purposes.[4] The first case in which the Supreme Court recognized that the Federal government had the power to condemn private[5] property in order to preserve an historic site was *United States v. Gettysburg Electric Railway Co.* (1896), which allowed the creation of Gettysburg Battlefield Memorial.[6] In its decision the Court refused to adopt a narrow constitutional interpretation offered by the railroad, which would have placed the condemnation of its property outside the definition of a taking for a 'public purpose' necessary for government condemnation of property. The Court did not discuss whether the government could utilize regulatory schemes to facilitate historic preservation, nor did it address the question of whether the government could extend its efforts to condemn and acquire sites with no apparent historical connections-issues which would be extremely important in the future development of preservation law.

Around the turn of the century, local governments began to adopt a European approach to land use and zoning regulation for the purpose of preserving the 'local character' of their towns. The City of Baltimore, for example, adopted a 70-foot maximum height regulation to maintain the character of its residential and commercial areas. A similar regulation was adopted the same year by the city of Boston. The Baltimore regulation was challenged in *Cochran v. Preston* (1908)[7] and upheld by the Court of Appeals on the ground that it was designed to reduce fire hazards in addition to containing an aesthetic preservation goal. The Boston ordinance was also challenged, and ended up before the Supreme Court in 1909.[8] The Court upheld the ordinance as being reasonably related to public health and safety, primarily in the area of fire prevention. Still, the Court did not address the issue of whether government regulation could be justified under constitutional substantive due process standards for preservation reasons. It would be 1978 before that question would be answered in the affirmative.[9]

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Antiquities Act

Federal policy to preserve historic and prehistoric sites on Federal lands was first embodied in the Antiquities Act of 1906,[10] which authorizes a permit system for investigation of archeological sites on Federal and Indian lands, and gives the President the power to establish national monuments on Federal lands for the purpose of protecting historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest. The Antiquities Act specifies protection of antiquities on all lands owned or controlled by the Federal government and gives authority for their proper care and management to the Department having jurisdiction. This means that Indian lands, forest preserves, and military reservations are included. The statute has no felony provisions, and penalties limited to criminal misdemeanor charges with fines up to $500 and/or 90 days imprisonment, are imposed upon those "who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity situated on lands owned or controlled" by the Federal government unless they have a permit[11] issued through the Secretary of the Department having jurisdiction.[12] Previously, specific legislative authorization was required for each designation. Although the authority to regulate the excavation or collection of archeological remains from federally controlled lands now rests principally with ARPA, monuments still are created under the Antiquities Act, and that statute limits monuments to "the smallest area compatible with the proper care and management of the objects to be protected."[13]

Historic Sites Act

The Historic Sites Act,[14] enacted in 1935, declared a Federal policy to preserve historic and prehistoric properties of national significance. It gives the Secretary of the Interior authority to make historic surveys, as well as other broad powers to protect historic properties, and establishes the National Historic Landmarks Program. This legislation sets standards for identification and preservation of National Historic Landmarks. It does not contain any sections that address enforcement.[15]

National Historic Preservation Act (NHPA)

NHPA was originally passed by Congress in 1966[16] and established a Federal policy of cooperation with other nations, Tribes, States, and local governments to protect historic sites and values. Together with its implementing regulations, NHPA authorizes the National Register of Historic Places,[17] creates the Advisory Council on Historic Preservation,[18] provides further considerations for National Historic Landmarks,[19] and creates procedures for approved State and Local Government Programs.[20] The National Register of Historic Places criteria for evaluation of properties to be nominated are found at 36 CFR Part 60.4. Consideration is given to "districts, sites, buildings, structures and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association" and that are (a) related to events that have made a significant contribution to the broad patterns of our history; or that are (b) associated with the lives of persons significant in our past; or that (c) bear a pattern of distinctive characteristics of historic, architectural, archeological, engineering or cultural significance; or that (d) have yielded or may in the future yield important information as to our history or prehistory.

Regulatory provisions accompanying NHPA require the State Historic Preservation Officers (SHPOs) to prepare and implement State historic preservation plans.[21] Protection of identified historic sites is facilitated through implementation of NHPA Section 106 review, which is a five-step process designed to ensure that historic properties are considered during the planning and execution of Federal projects.[22]

The major amendments to NHPA, passed in 1980,[23] provide support for archeological resources protection because they codify those portions of Executive Order 11593[24] requiring Federal agencies to develop programs to inventory and evaluate historic resources. The amendments also authorize Federal agencies to charge reasonable costs for such activities to Federal permittees and licensees.[25]

Archeological and Historic Preservation Act[26] (AHPA)

Though it has been called the Archeological Recovery Act and the Reservoir Salvage Act, AHPA has no official short title. Most importantly, it requires Federal agencies to preserve historic and archeological data, including the objects and materials collected from archeological sites, which may otherwise be lost or destroyed as a result of "any Federal construction project or federally licensed activity or program." Up to 1 percent of project funds may be appropriated to conduct archeological data recovery activities, in addition to any costs for archeological work required for project planning.[27]

Archaeological Resources Protection Act (ARPA)

Of the laws currently in place for protecting archeological resources, one of the most far-reaching is the Archaeological Resources Protection Act of 1979 (ARPA)[28] with its subsequent amendments of 1988.[29] This is particularly true since adoption in 1984 of uniform regulations by which many aspects of ARPA are enforced.[30] Under Section 6 of ARPA the first significant criminal penalties can now be imposed for the vandalism, alteration, or destruction of historic and prehistoric sites[31] on Federal and Indian lands, as well as for the sale, purchase, exchange, transport, or receipt of any archeological resource if that resource was excavated or removed from public lands or Indian lands or in violation of State or local law. The penalties include up to $250,000 in fines and up to five years imprisonment.[32] In addition, ARPA provides civil penalties for the acts prohibited under Section 6, as well as for violations of ARPA permits.[33] The penalties include the forfeiture of property used for illegal site disturbances or destruction and forfeiture of illegally obtained artifacts.[34]

The critical provisions of ARPA make it illegal to excavate or remove any archeological resources from Federal or Indian lands without a permit from the Federal land manager. Permits for archeological work on Indian lands may be granted only after obtaining consent of the Indian allottee or Indian Tribe owning or having jurisdiction over such lands. One of the conditions for issuance of a permit is that the applicant demonstrate that proposed activities will provide increased knowledge of archeological resources. A primary purpose of the statute is to increase the exchange of information and general communication among governmental entities, professional archeologists, and the public. Finally, ARPA requires uniform regulations to be promulgated by the Secretaries of the Interior, Defense, and Agriculture and the Chairman of the Tennessee Valley Authority. Federal land managers, as defined in ARPA, may promulgate additional regulations, consistent with the uniform regulations, which may be needed by their agencies.

Currently there are a few State statutes that address protecting archeologically significant sites located on private lands but there are no comparable Federal statutes. Unlike the European nations, the United States has not embraced the concept of a national cultural heritage law that protects significant resources within the boundaries of private ownership of land.

Although the most recent amendments to ARPA will improve the effectiveness of the antilooting portions of the statute via interagency cooperation, there are certain areas in which the only effective remedy will be increased involvement of the law enforcement community. This community includes local, State, and Federal law enforcement personnel, attorneys, and the judiciary involved at each level of prosecution. At present many of these individuals do not know that the statute exists, or if they are aware of it, they still prefer to utilize more familiar State and local laws that prohibit theft, vandalism, or trespass. Although such laws do take care of some of the problems, they do not deal effectively with the destruction of cultural resources and information because the focus is in punishing specific common law offenses.[35] Because these laws are also more familiar to the members of juries, as well as the judges, who may be deciding the cases, prosecutors often see a strategic advantage in presenting a cause of action that will not be misunderstood.

When Congress passed ARPA in 1979, legislators and preservationists hoped that it would result in a reduction of vandalism and looting of the nation's prehistoric and historic archeological sites. They looked to ARPA as a vehicle for education that would lead to a heightened public awareness of the problem as well as provide a major deterrent to looters and illegal commercial traffickers through its substantial penalty provisions.[36] This continues to be the case, as ARPA was strengthened by the 1988 amendments with requirements that Federal agencies develop plans for surveying lands not scheduled for projects, develop and implement systems for reporting and recording archeological violations, and develop public awareness programs. The amendments also provide for a lower felony threshold, reduced from $5,000 to $500 damage caused, and prohibit attempts to damage archeological resources.[37] Today, the successful enforcement of ARPA depends upon a variety of interrelated factors:

(1) Education of the professional communities, including archeologists, agency managers, law enforcement personnel, and jurists, particularly in the areas of preservation law, policy and technology;

(2) Education of the citizenry at large to foster awareness and appreciation of both historic and prehistoric cultural resources and the importance of protecting and preserving these resources;

(3) A team approach to collection of data and evidence in investigative casework;

(4) Communication and cooperation among the agencies that, under the statute, are responsible for the joint administration of the law, including,

> (a) Effective monitoring of the condition of archeological resources by land managing agencies, and
>
> (b) Effective cooperation between law enforcement and cultural resource personnel in managing these resources; and

(5) Research and development of more effective protection measures.[38]

Related Federal Legislation

In addition to the statutes that specifically address cultural resources preservation, other legislation also recognizes the importance of historic and prehistoric site protection. While the preservation statutes themselves may be limited by weaknesses in certain areas, their enforcement potential may be increased by their function in tandem with other laws.

Department of Transportation Act (DOTA)[39]
No program undertaken by the Federal Highway Administration, Federal Aviation Administration, Urban Mass Transit Administration, or the U.S. Coast Guard will be approved when it requires use of land from a historic site, whether of national, State, or local significance, *unless there is no feasible and prudent alternative but to use such lands, and unless the program includes all possible planning to minimize harm to the historic properties* (emphasis added).[40]

National Environmental Policy Act (NEPA)[41]
Because NEPA's Environmental Impact Statement (EIS) requirement applies to all proposed major Federal actions that may significantly affect the quality of the human environment, it has become an effective procedural

statute that is applicable to cultural resources preservation.[37] The EIS must be prepared prior to such proposed actions. Both NEPA and NHPA apply only to Federal actions, and although these statutes neither specifically prohibit activities that may ultimately result in damage to or destruction of archeological resources nor require actions to preserve cultural resources, the courts have usually considered NEPA applicable to such resources, in that the natural environment includes our "historic and cultural heritage".[38]

American Indian Religious Freedom Act (AIRFA)[39]
This Act seeks to protect and preserve traditional Native American, Eskimo, Aleut, and Hawaiian spiritual beliefs and practices by providing access to ancient sites for these Native peoples. AIRFA also provides for the use and possession of sacred objects by members of the Native American Tribes. Archeological site protection is a Federal activity related to AIRFA, since it directs the various agencies to consult with Native traditional religious leaders in a cooperative effort to develop and implement policies and procedures that will aid in determining how to protect and preserve Native American cultural and spiritual traditions. Section 10(a) of ARPA requires that uniform regulations be promulgated for ARPA after consideration of AIRFA.

Federal Collections Act of 1966[40]
This Act requires that Federal agencies attempt collection of all claims for money or property damage arising out of activities on Federal lands, including claims resulting from unauthorized or illegal activities that damage or destroy cultural resources. Historic and prehistoric sites have clearly been defined as "resources" under the Antiquities Act, NHPA, and ARPA, and collection requires careful analysis by a professional archeologist whose training includes methods of site appraisal, such as provided in the uniform regulations for ARPA, that will translate site damage into monetary terms and satisfy the evidentiary requirements of a court case.[41]

18 U.S.C. 641, Embezzlement and Theft[42]
This statute provides that, "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys, or disposes of any record. . .or thing of value of the United States or of any department or agency thereof. . .or whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined, or converted shall be fined not more than $10,000 or imprisoned not more than 10 years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both." "The word, 'value' means face, par, or market value, or cost price, either wholesale or retail, whichever is greater." This statute, together with the malicious mischief statute, may be used in coordination with ARPA to establish liability of looters as well as their connected commercial agents or dealers in artifacts.[43]

18 U.S.C. 1361, Destruction of Government Property (Malicious Mischief)
This statute provides: "Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof. . .shall be punished as follows:

If the damage to such property exceeds the sum of $100, by a fine of not more than $10,000 or imprisonment for not more than ten years, or both; if the damage to such property does not exceed the sum of $100, by a fine of not more than $1,000, or by imprisonment for not more than one year, or both."

The advantages to including this statute when litigating against looters and vandals is clear, since its penalties may be applied to partial site destruction or to destruction and/or removal of smaller non-replaceable resources such as portions of pots, chipping tools, and fabric remnants.[44]

18 U.S.C. 1163, Embezzlement and Theft from Indian Tribal Organizations
This statute is similar to 18 U.S.C. 641, described above, but it applies specifically to embezzlement and theft from Indian Tribes.

Alternative fines are also applicable to both the malicious mischief and embezzlement/theft statutes. Pursuant to 18 U.S.C. 3571, maximum fines may be imposed for convictions under 18 U.S.C. 1165, 18 U.S.C. 641, and 18 U.S.C. 1361, as follows:

Misdemeanor conviction, value less than $100.00, up to $100,000 maximum fine. Felony conviction, value exceeds $100,000, maximum fine up to $250,000.

If the defendant is an organization, the maximum fine rates are doubled, although no term of imprisonment can be imposed.

18 U.S.C. 371, Conspiracy to Commit Offense or Defraud the States
For a discussion of the application of the Fifth Amendment double jeopardy clause to subsequent criminal prosecutions and the possibility of bar as to "same offense" charges, see *Grady v. Corbin*, 110 S. Ct. 2084 (decided May 29, 1990).

Companion State Statutes

Research into existing State statutes that are applicable to archeological resources protection was begun by examining a collection of State laws contained in National Park Service (NPS) files. The list obtained was expanded through a search of the LEXIS and the WESTLAW computer services. Additional information was provided through correspondence with participants in the NPS, Forest Service, and Federal Law Enforcement Training Center who provided LOOT Clearinghouse information (see discussion of LOOT Clearinghouse below). The chart of State statutes (Figure 1) represents the several categories that were needed to identify statutes ap-

plicable to cultural resources protection. Use of these categories was particularly important in the computer searches because there are no generalized cultural resources headings under which these laws can be principally found. Finding these laws depends upon how an individual State categorizes the nature of the protection or the type of offense committed. The laws covering archeological resources protection rarely are codified under a single heading. Additionally, it is likely that new laws have been passed in State legislatures and existing laws may have been re-titled or consolidated since June 1990, the date of this research.

State statutes in force as of July 1990, fall into five categories that reinforce or complement ARPA (See Figure 1):

1. Restrictions on sales of antiquities or forgeries (14 States);

2. Laws to discourage activities that damage archeological resources on private land (11 States);

3. Mirror ARPA statutes, including penalty provisions (37 States);

4. Penalties for disturbances of marked and unmarked burial sites (11 States). Eight states have reinterment statutes, but only two of these also have an anti-disturbance statute; and

5. Statutes providing for acquisition of real property or artifacts.[50]

An additional seven states had pending legislation for 1989-90 sessions in one or more of the five categories, with the emphasis of proposed legislation upon marked and unmarked burial sites. In addition, several States have statutes providing protection to specific areas, such as underwater salvage sites (10 States), caves (4 States), earthworks (2 States), forts (2 States), ghost-towns (Colorado only), petroglyphs or rock art (3 States), and State preserves (Iowa only).

Many States have statutes that establish State archeologists, State historical agencies, involvement in cultural resources issues by Native Americans through established advisory councils, and State registers of historic places. There are also statutes that provide for State cultural resources surveys, regulatory issuance of permits for field investigations, obligations to report discoveries that may have historic or prehistoric archeological significance, and protection of the confidentiality of site locations.

Survey of SHPO Resources Protection Activities

During preliminary research for this Technical Brief it was determined that, while it was important to understand the regional context of archeological resources protection at other levels of government, little information actually was available about such programs at State Historic Preservation Offices (SHPO). Therefore, a survey was conducted between January and August 1990, to query 50 State Historic Preservation Officers and 14 of their deputies about a wide range of protection activities. There were 41 responses (56 %).

The results of the survey show that SHPOs are active in the following areas (numbers of affirmative SHPO responses shown in parentheses).

Casework

Some SHPOs have provided assistance in archeological protection under the Antiquities Act (8) and ARPA (13). Many SHPOs listed activities within the Section 106 procedures of NHPA as their primary source of involvement under Federal law.

Some SHPOs reported assisting with archeological protection pursuant to a variety of State statutes, including theft (4), trespass (5), vandalism (11), site disturbances, including burials and confidentiality of site locations (17), permit violations (10), sales of forged artifacts (4), and archeological surveys or salvage excavations on State lands (1).

Responses from 14 SHPOs documented direct assistance in 17 archeological protection cases prosecuted between 1985 and 1990, with some of those cases still pending resolution. Seven of the cases were prosecuted under ARPA, either alone or in conjunction with other statutes.

SHPO assistance in case preparation has included gathering information or evidence on-site (13), consultation with attorneys (8) and law enforcement personnel (10), giving testimony at trials (9) or hearings (5), and participation in courtmartial proceedings (1).

Legislative and Administrative Assistance

SHPOs reported infrequent participation in legislative activities. However, such activity by preservationists is extremely important because cases are often won or lost on the strength of a statute. One of the most powerful ways to increase protection of archeological resources is through implementation of effective State statutes. The courts are the interpreters of the law, and when there exists a preservation statute that the court may appropriately apply, case preparation may be approached from a much stronger position. For example, SHPO expertise and input were instrumental in the draft-

STATE STATUTES PROTECTING ARCHEOLOGICAL RESOURCES

	AL	AK	AZ	AR	CA	CO	CT	DE	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY
STATE PUBLIC LAND																																																			
STATUTORY CLAIM	●			●	●	●		●	●	●																																								
STATE FORESTS	●	●		●		●	●				●	●	●	●		●																																			
RULES AND REGULATIONS																																																		
AUTHORITY				●		●	●	●				●	●		●		●			●	●	●	●	●	●																											●
PROMULGATION			●					●				●			●		●			●																																
NATIVE AMERICAN INVOLVEMENT		●					●								●	●																																			
APPROVAL REQUIRED OR CONSULT REQUIRED		●													●																																			
APPOINTED TO STATE AGENCY		●													●	●																																			
STATE SURVEY/INVENTORY	●	●	●	●	●	●	●		●	●	●		●	●	●																																			
OBLIGATION TO REPORT DISCOVERIES			●				●	●	●	●					●	●	●																																		
CONFIDENTIALITY OF SITE LOCATIONS					●	●		●					●																																					
PERMIT TO CONDUCT FIELD INVESTIGATIONS	●	●	●		●	●	●	●	●	●		●	●	●		●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●
ACQUISITIONS																																																		
REAL PROPERTY OR ARTIFACTS		●			●	●		●		●	●		●	●		●	●			●	●	●	●	●	●																										●
DURATION																																																		
STATE MUSEUMS			●	●	●		●	●	●				●		●					●																															●
VIA PERMIT			●		●	●	●		●				●			●					●	●																												
OTHER	●				●	●	●		●		●			●	●					●		●	●																											
COMMERCIAL RESTRICTIONS																																																		
SALE OF ANTIQUES OR SALE OF FORGERIES		●	●				●		●	●	●			●							●																												●	
DISCOURAGING ACTIVITY ON PRIVATE LAND		●	●	●				●	●	●																																							
PENALTIES	●	●	●	●	●	●	●	●	●		●	●	●	●	●	●			●	●	●	●	●	●		●			●	●	●	●	●	●		●	●	●	●	●	●	●	●	●	●	●	●	●	●
BURIALS	●	●			●		●	●	●		●		●	●	●	●		●	●	●		●			●	●																								●	
WITH REINTERMENT		●					●		●		●				●					●		●																												
PROHIBITS EXCAVATION		●			●			●	●				●		●																																			

Figure 1. State Statutes Protecting Archeological Resources Protection

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ing and subsequent enactment of State legislation in Arizona to protect and preserve ancient burial sites on private land.[51]

SHPO legislative efforts necessarily include the building of a constituency that will be available for future legislative activities in related areas. The SHPO survey documented the following legislative and administrative activities: drafting bills (1); legislative task force membership (3); and Federal grant project reviews (1).

Training

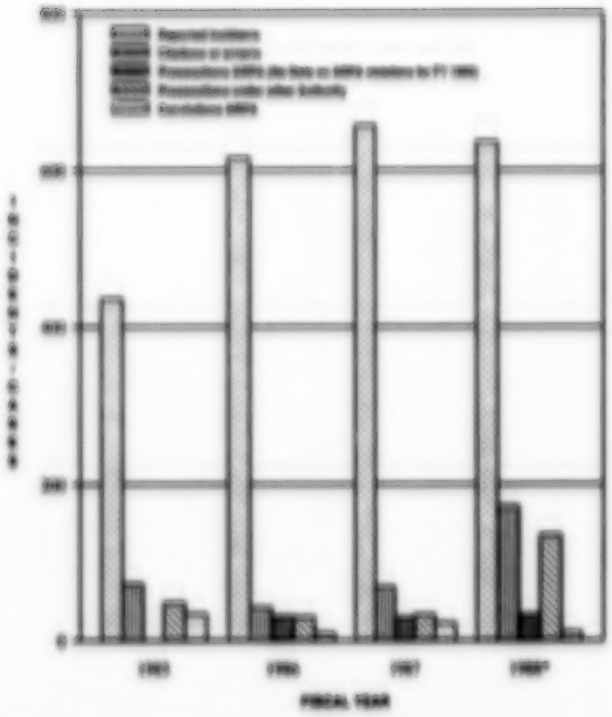
SHPOs also recognized their participation in training programs for archeological resources protection. SHPOs were both students (19) and teachers (13) in various programs including the 40-hour skills development course sponsored by the Federal Law Enforcement Training Center, the 12-hour overview of archeological protection programs sponsored by NPS, public awareness programs, and inhouse workshops. Eleven SHPOs indicated that there had been no participation in preservation law training.

Results of the survey confirm that SHPOs are a potentially valuable resource in expanding efforts to enforce preservation laws and educate the general public about archeological resources protection. While most enforcement activities continue to be conducted by Federal agencies, significant public awareness efforts are conducted by States, especially during "archeology weeks." When these are coupled with improved cooperation among law enforcement jurisdictions, there can be an important impact in reducing site vandalism.

Application of ARPA

Federal and Indian lands are the clear province of ARPA, and the statute requires four agencies, the Departments of the Interior, Agriculture, and Defense, and the Tennessee Valley Authority, to provide uniform regulations for its implementation. Federal agencies also may adopt supplementary regulations, as long as these are consistent with the uniform regulations. In addition, the Secretary of the Interior is charged with reporting to Congress on the Federal archeology program and activities conducted pursuant to ARPA. This function is completed by Interior's Departmental Consulting Archeologist (DCA), who receives staff support from the NPS Archeological Assistance Division. Annually, Federal agencies cooperate to provide information about their programs to the DCA, and this includes information related to enforcement of archeological protection laws.[52]

Collection of information about enforcement reflects only activity at known archeological sites. The majority of sites that probably exist on federally controlled lands have yet to be inventoried or evaluated. Congress recognized the need to conduct broader archeological surveys



* Includes 1988 data on file as of December 1988. Pending prosecutions and convictions at time information was submitted have not been included.

Figure 2. Vandalism and looting statistics, FY 1985 and FY 1988.

to complement project-specific archeological work by adding Section 14 to ARPA in 1988. The latest available information indicates that, overall, Federal agencies estimate that less than 8 percent of the lands they manage have been investigated for possible archeological sites. The magnitude of site looting and vandalism is more easily understood by looking at one area, the "Four Corners" of the Southwest,[53] wherein significant percentages of the known archeological sites have been damaged or destroyed by either casual or unintentional disturbance or by systematic commercial looting.[54]

Between 1985 and 1987, a total of 1,720 incidents of archeological looting were reported by Federal agencies. These incidents resulted in a total of 134 citations, 49 arrests, 57 criminal misdemeanor convictions under ARPA, 16 felony convictions under ARPA, and 17 civil penalties under ARPA.[55] The largest number of cases actually prosecuted were brought under other authorities, such as other Federal statutes, State statutes, or agency-specific regulations.[56]

Archeological site monitoring throughout the vast Federal lands areas is difficult, at best.[57] In addition to the inadequate number of personnel available for site patrol, many known sites are virtually undetectable to the untrained eye, and damage may be undiscovered or unnoticed for long periods of time. Consequently, timely discoveries of looting have been one problem for enforcement.[58] The 1988 Federal agency information indicates that only 15 percent of the reported incidents were

found in time to issue citations or perform an arrest. Also, convictions reported for a given year may be for prosecutions begun two to five years earlier.[59] (See Figure 2)

Protection strategies on federally controlled lands have included increased patrols, site monitoring, including surveillance technology such as hidden alarm mechanisms, and remote sensing, and interagency cooperation. The result has been a significant increase in reported ARPA violations, but there has yet to be a correspondingly dramatic increase in citations, arrests, prosecutions, or convictions under the statute. It is also evident that actual looting and trafficking in artifacts far exceeds the number of reported incidents.

LOOT Clearinghouse Cases

Another source of information about archeological protection is the Listing of Outlaw Treachery (LOOT) Clearinghouse, created by the NPS Archeological Assistance Division. It contains voluntarily submitted reports for cases of archeological looting and vandalism. Its objectives are to improve the quality of information available about archeological protection, increase the effective use of that information for future enforcement efforts, and expedite the communication of case strategies and results among the many government agencies. Case-specific information for the LOOT Clearinghouse is collected on a form that is distributed to Federal agencies along with the questionnaire requesting data on Federal archeology programs for the annual report to Congress.[60] Respondents are asked to supply information on cases that have been completed, not about ongoing investigations. Others concerned with archeological protection, such as attorneys, law enforcement officials, or professional archeological consultants, also are asked to submit information on completed cases with which they are familiar.

Table 1 compares the programmatic data gathered as part of the annual report on the Federal archeology program with the case-specific data reported on individual LOOT forms. The discrepancy in numbers is a result of the way in which cases and incidents are grouped, how many LOOT forms document the resolution of cases, and whether or not cases brought under statutes other than ARPA are included in either the annual report data or the LOOT data.

Although the primary purpose of LOOT is to provide "a central place for those seeking information on prosecutions of looting and vandalism,"[61] it also reflects how often and with what success such prosecutions are brought under ARPA, either alone or in combination with other statutes. The LOOT Clearinghouse presently contains information on approximately 100 cases; 23 of these predate the passage of ARPA, while another 24 predate the adoption of ARPA's implementing regulations.[62] All but a few entries predate the 1988 amendments to ARPA, which make it easier for prosecutors to build strong cases.

A brief discussion of pre-regulations cases may be necessary to the understanding of ARPA's development, but the effectiveness of ARPA should be viewed in light of the past five years that these regulations have been in place. In addition, the 1988 amendments to ARPA provide three important changes in favor of enforcement. These include: (1) reduction of the damage amount that establishes the criminal offense from $5,000 to $500;[63] (2) insertion of language into Section 6(a), which makes it a criminal offense to ". . . attempt to excavate, remove, damage, or otherwise alter or deface" any archaeological resources on federally controlled lands,[64] and (3) development of a reporting system to document suspected violations under ARPA.[65]

Category	Report questionnaire	LOOT Clearinghouse
Incidents	2,350 (includes cases and incidents)	47 (includes cases only)
Arrests	91 (with or without further action)	19 (arrests followed by trial or hearing)
Citations	256 (with or without further action)	7 (citations resulting in trial)
Prosecutions	119 (no details)	50 (disposition documentation incomplete)
Convictions		
Felony	19	Unspecified
Misdemeanor	67	Unspecified
Civil Penalty	27	Unspecified
Other Statutes	190 (no indication whether case is pending, dropped, settled, or tried)	15

Table 1. Archeological Protection Case Data Comparison

Prosecutions under ARPA prior to regulations were limited because the statute did not designate civil penalties and also because of the more narrow definitions of "archaeological resource" provided in ARPA itself. ARPA *felony* criminal prosecutions now require four elements of proof:

(1) that defendant did knowingly excavate, remove, damage, alter, or deface an archeological resource;

(2) that said resource was located on public and Indian lands;

(3) that the defendant acted without a permit;[66] and

(4) that the archeological value or commercial value and cost of restoration and repair exceeded $500.[67]

Despite temporary limitations prior to 1984 due to the need for implementing regulations, seven prosecutions under ARPA were instituted during the first few months after it became law. The ARPA count was usually accompanied by a separate count under 18 U.S.C. 1361, Destruction of Government Property, and the cases were heard either in U.S. District Court or brought before the appropriate Federal Magistrate. Representative convictions from these cases include *United States v. Palmer* (D. Utah, April, 1980), for illegal excavation ($200 fine, 2-year probation, plus $500 fine assessed in lieu of confiscation of a vehicle); *United States v. Brady* (D. Arizona, November, 1979), for excavation and damage to a prehistoric site (6 months suspended sentence; 3-year probation); and *United States v. Shumway*, No. Cr80-5 W (D. Utah, November, 1979) for illegal excavation and destruction of government property ($750 fine; 3 years suspended sentence with 3 years probation).[68] In one early case, the defendants even petitioned for prosecution under ARPA, although their original offense was committed prior to ARPA's enactment. The plea was granted, and on May 19, 1980, the first sentences under ARPA's felony provisions were imposed.[69]

For the period between 1980 and the adoption of ARPA uniform regulations in 1984 the LOOT clearinghouse documents 19 additional ARPA prosecutions. The pattern emerging from the remainder of these pre-regulation cases shows guilty verdicts by either judge/magistrate or jury for all but one defendant. Prison sentences were usually completely suspended, though one defendant did serve 6 months imprisonment, with supervised probation of 2 to 3 years being imposed instead of jail time. Community service hours were imposed on one defendant. Fines were imposed in less than 50 percent of the cases. Some of the fines were later declared uncollectible by the Justice Department, and most fines did not reflect the actual damage amounts presented by the government after damage assessments and analysis by expert archeologists.[70] Lack of ARPA regulations resulted in the only complete acquittal during this period. In that case,[71] defendants were found not guilty of causing $9,000 in damages to a rock shelter because it was not clearly demonstrated that a rock shelter is an archeological resource.

ARPA uniform and supplementary regulations have clarified uncertainties as to the statute's application and have enhanced the prosecutor's ability to cover a wide range of activities that have resulted in damage to or destruction of archeological resources. ARPA focuses on those activities that have been categorized as "predatory or malicious," which include collecting for personal or commercial gain and wanton property destruction with or without commercial or personal motive. Such looting and vandalism occurs: through digging, also commonly called "pot-hunting", and use of heavy machinery; carving, chipping, scratching, or other general defacement; surface collection of artifacts from archeological sites; theft of artifacts from historic or prehistoric structures; removal of all or portions of a structure; arson; climbing or walking on resources; breaking artifacts, objects, or windows; knocking structures over; throwing rocks and other debris into excavated ruins; or simply handling or touching the structure or contents of sites.[72] It should be emphasized that although surface collection of arrowheads is not prohibited under ARPA, such activity does violate both the Antiquities Act *(See Page 2)*, and the Theft of Government Property statute 18 U.S.C. 641.

The LOOT Clearinghouse contains reports on 60 cases dating from the time of adoption of ARPA regulations, but only 28 of those included ARPA counts for prosecution.[73] Only 16 defendants were prosecuted solely under ARPA. Those activities successfully prosecuted included theft of Civil War relics from public lands, site disturbances-digging or sifting for artifacts-on public lands, removal of material remains or artifacts from prehistoric Indian burial sites, looting of historic shipwrecks in national reserve waters, and trafficking in stolen artifacts illegally obtained from public lands.

Successful prosecutions do not necessarily mean automatic imposition of appropriate fines or other penalties. LOOT reflects only $270 collected in civil fines,[74] although the number of substantial forfeitures has increased. Items forfeited usually include all tools and equipment used in search and removal efforts, digging tools, metal detectors, diving equipment, and even vehicles such as trucks and boats. Of course, all artifacts in the possession of the defendants are usually confiscated and, upon conviction, those items are forfeited. Defendants who actually serve prison time for ARPA violations continue to be the exception because these sentences often are suspended by the court or magistrate in favor of supervised probation and fines. The amounts of criminal fines imposed continue to be far less than the statutory allowances, with the exception of one $10,000 fine[75] and one $21,000 fine, which was assessed under another statute. Another notable exception was the assessment of $132,000 in civil penalties against seven individuals who looted shipwrecks within a National Park and a National Marine Sanctuary.[76] Typically, however, the average fine imposed is under $500, but hours of

community service also are required. Denial of access to public lands or monuments is imposed on many defendants during their probationary periods.[77]

If a general trend can be seen through analysis of the LOOT Clearinghouse cases thus far, it is clear that ARPA prosecutions are increasing, but it is less likely that a prosecution is brought under ARPA alone.[78] Federal statutes governing theft and embezzlement of government property or destruction of government property (See Page 4) usually are included along with the ARPA counts. Attorneys may be more willing to prosecute exclusively under ARPA where the defendant has a prior ARPA conviction, whether felony or misdemeanor, since after one conviction there is no felony threshold with regard to damage to the archeological resource, and the maximum penalty is now up to five years imprisonment and/or as much as $250,000 in fines.

There still appears to be a reluctance on the part of prosecuting attorneys to include the additional civil damages that are available under ARPA. In one case, although information as to civil liability was presented in detail to the Grand Jury, the attorneys on the case elected not to pursue civil prosecution. The defendants escaped fines of several thousand dollars, paying only the criminal fines and receiving suspended sentences in favor of 5 years probation with 100 hours of community service to be performed. In another case involving an underwater site, the attorney elected not to prosecute under ARPA at all, rationalizing that the court might not consider "diving" for artifacts to be covered under the statute, which speaks to "digging." The LOOT report correctly pointed out that such a rationale would not have prevented prosecution under the National Historic Preservation Act, (See Page 2), which makes it a violation to remove artifacts from Federal property in any manner. Pre-trial agreements or plea bargaining also account for the dropping of ARPA counts in exchange for guilty pleas to lesser offenses. There are two possible explanations for this. Perhaps United States Attorneys continue to have doubts about prosecuting under ARPA because of possible negative statutory interpretations or questions about whether the defendants' activities would really satisfy requirements for an ARPA violation. Alternatively, the potential for violators to receive significant criminal penalties under ARPA may have been shown to be a useful element in effective plea bargaining.

A note of caution is appropriate here. Several factors greatly influence the quality and accuracy of current ARPA enforcement documentation. A large number of Federal agencies are required to respond to the annual NPS questionnaire,[79] and the accuracy and completeness of those responses vary widely depending upon the interest and expertise of the person filling out the form. Cumulative figures are skewed because neither the Department of Transportation nor the Justice Department provides responses to the questionnaire that corroborate media reports and other independent information about their activities relative to ARPA violations[80] and prosecutions. The LOOT case forms usually are completed and submitted[81] by Forest Rangers, Park Rangers, and Regional or State Archeologists, who, in turn, are getting their information from agency patrol reports, United States Attorneys, newspaper or magazine articles, and, occasionally, court records.[82] The case reports are limited to known archeological sites.

Interpretation of what constitutes a "case" in the LOOT forms also depends upon the informant. LOOT reports include "incidents" that resulted in the assessment of fines-an occurrence that requires some sort of formal procedure-yet the report is silent as to dates of arrest, indictment, hearing, or trial. Conversely, there are LOOT reports that clearly reflect that a hearing or trial has taken place, but there is no information as to the forum of that proceeding or as to whether the penalties assessed were civil or criminal in nature. Furthermore, even when distinction is made between criminal and civil penalties, the nature of the criminal punishments-felony or misdemeanor-are omitted. ARPA violations are often documented, but many of the LOOT reports do not indicate if the actual charges brought were under ARPA or another statute or both. When statutes are cited, there are often omissions as to which counts were dropped during plea bargaining or which counts are included in the resulting guilty verdicts. Amounts that are listed as "fines" are sometimes really the value of items forfeited, and there is confusion among the individual reporters as to what is meant by the terms "restitution," "fine," "forfeiture," and "court costs." On occasion, an agency will have so many violations that it literally stops counting and begins generalizing.[83]

Conclusion

The legal background of archeological resources protection is long, reflecting more than 100 years of public concern to preserve the material evidence of the nation's past. That concern has changed over time, and since the late 1970s efforts to integrate research, public education, and law enforcement to further safeguard these irreplaceable parts of our heritage have increased. The enactment of ARPA was a major result. Along with ARPA, there now is a significant body of law available to those who are responsible for protecting archeological resources from looting and vandalism. Case histories demonstrate that effective enforcement has increased, especially when conducted as part of a larger program of archeological resources stewardship and public awareness. Often, these cases have inspired the public's interest in its heritage and fostered a wider understanding of its rich cultural past.

Endnotes

1. Some of the areas in the Southwest, Pacific Northwest, and Alaska, in particular, cover many hundreds of square miles, over terrain with high levels of inaccessibility.

2. P.L. 96-95, *as amended by* P.L. 100-333 and 100-588; 16 U.S.C. 470aa-mm (1988).

3. (Davidson, Christopher), editor. *A Handbook on Historic Preservation Law*. The Conservation Foundation and The National Center for Preservation Law, Washington, DC, 1983, p. 193.

4. Ibid., p. 3.

5. The Fifth Amendment to the Constitution specifies the procedural protection in its "taking clause": "nor shall private property be taken for public use, without just compensation."

6. 180 U.S. 608 (1896).

7. 108 Md. 220, 70 A. 113 (1908).

8. *Welch v. Swasey*, 214 U.S. 91 (1909).

9. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). An earlier Supreme Court case, *Berman v. Parker*, 348 U.S. 26 (1954), gave strong support to ideas to the concept of government condemnation action for aesthetic purposes when Justice Douglas wrote: "The values (public welfare) represented are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. Whether one agrees or disagrees with what they have done does not matter. What they have done is plainly within the authority of Congress. The power of the purse is an adequate means to attain the end. And the right to realize it through the exercise of eminent domain is clear. . . . the means by which it will be attained is also for Congress to determine" (348 U.S. 26, p. 33). However, *Berman* dealt with local historic District of Columbia ordinances and recognized that the ordinances to question considered aesthetic values as one of many criteria encompassed by the term "public welfare." The *Penn Central* decision made it clear that individual landmarks as well as historic districts could be preserved. Justice Brennan, writing for the Majority, stated: "[H]istoric preservation is but one aspect of the much larger problem, basically an environmental one, of enhancing or perhaps developing for the first time the quality of life for people. New York City, responding to similar concerns and acting pursuant to a New York State Enabling Act, adopted its Landmarks Preservation Law in 1965. . . . The New York City law is typical of many urban landmark laws in that its primary method of achieving its goals is not by acquisitions of historic properties, but rather by involving public entities in landmarks decisions affecting those properties and providing services, standards, controls, and incentives that will encourage preservation by private owners and users" (438 U.S. 108-111 (1977)). The court concluded that "the restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper, but also other properties" (438 U.S. 138 (1977)).

10. P.L. 59-209, 16 U.S.C. 431-433 (1906). The historical background of this law is the topic of *The Antiquities Act of 1906*, by Ronald F. Lee, National Park Service, Washington, DC, 1970 (NTIS order number PB190301). See also Hal Rothman, *Preserving Different Pasts: The American National Monuments*, University of Illinois Press, Chicago, IL, 1989.

11. Section 432 of the Antiquities Act provides that permits will be issued for examinations, excavations and gatherings of objects when such activities are undertaken "for the benefit of responsible museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums." Currently, most Federal agency permits are issued under the authority of ARPA.

12. Maximum fine of $500 or 90 days in prison, or both. Ibid., Sec. 1.

13. 16 U.S.C. 431, § 2.

14. P.L. 74-292, 16 U.S.C. 461-467 (1935).

15. Regulations for the National Historic Landmarks Program are found at 36 CFR Part 65.

16. P.L. 89-665, 16 U.S.C. 470-470t (1966). Those responsible for Federal historic preservation programs and projects are encouraged to conduct them according to the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation, September 29, 1983 (48 F.R. 44716-44742).

17. Ibid., page 356 C.F.R. Part 60.

18. 36 C.F.R. Part 800.

19. 36 C.F.R. Part 65.

20. 36 C.F.R. Part 61.

21. 36 C.F.R. Part 60, in conjunction with Exec. Order No. 11593, Protection and Enhancement of the Cultural Environment, May 13, 1971 (36 F.R. 8921), emphasizes the necessary cooperation between State and Federal agencies to inventory and ensure the preservation of non-federally owned "sites, structures, and objects of historical, architectural, or archeological significance."

22. 36 C.F.R. Part 800 includes the regulations published by the Advisory Council on Historic Preservation to implement Section 106 of NHPA. Federal "undertakings" range from construction, rehabilitation, and repair projects to transfers or demolitions of Federal properties. Assessments result in one of three determinations: (a) no effect; (b) no adverse effect, i.e., one or more historic properties will be affected, but the historic qualities that make them significant will not be harmed; or (c) adverse effect, i.e., the undertaking will cause harm to one or more historic properties. See the Advisory Council on Historic Preservation publication: *Fact Sheet: Working with Section 106*, Washington, DC, revised September, 1988, pp. 3-4. The basic steps to arrive at a determination are: (1) identification and evaluation of historic properties, with the possibility of further studies to evaluate places that may have been considered eligible for inclusion in the National Register but were not so registered; (2) assessment of the effects that the Federal undertaking may have on the identified properties; (3) consultation on adverse effects with the SHPO, Indian Tribes, property owners, and others resulting in an agreement outlining measures to reduce, avoid, or mitigate any adverse effect; (4) a period of time for comment by the Advisory Council on Historic Preservation; and (5) implementation of the particular Federal project under the terms of the agreement.

If there is a memorandum of agreement (MOA) developed during Step 3 of the Section 106 process, ACHP may review and accept it, request changes, or decide to issue written comments. If previously unknown archeological resources are discovered after the project has begun, the Federal agency may choose to re-start the Section 106 process or notify the Secretary of the Interior according to Section 6(a) of P.L. 93-291.

23. P.L. 95-515. These amendments codify the requirement that Federal agencies assume the responsibilities for preservation of the historic properties, including the inventory and evaluation of archeological sites that are owned or controlled by them. Appearing as Section 110, this requirement is to ensure that historic preservation is fully integrated into the ongoing programs and missions of Federal agencies and to ensure that they exercise caution so that their activities do not destroy unrecovered sites. Section 110 guidelines are located at 53 F.R. 4727-4746 (February 17, 1988).

24. 35 F.R. 8921 (1971), reprinted in 16 U.S.C. 470h-2 (Supp. IV 1986).

25. This revives the question of whether private interests could be required to pay costs of preserving archeological or historical resources that would otherwise be destroyed by their activities.

26. P.L. 86-523, *as amended by* P.L. 93-291; 16 U.S.C. 469-469c (1974).

27. The NHPA (Note 28) also authorizes projects and project planning funds to be used in this manner. A Federal agency may exceed the 1 percent limitation with the concurrence of the Secretary of the Interior, which is based upon a review by Interior's Departmental Consulting Archeologist.

28. P.L. 96-95, 16 U.S.C. 470aa-ll (1979).

29. P.L. 100-555, approved October 28, 1988, P.L. 100-588, approved November 3, 1988; 16 U.S.C. 470ee-mm.

30. 43 C.F.R. Part 7, Department of the Interior; 36 C.F.R. Part 296, Department of Agriculture; 18 C.F.R. Part 1312, Tennessee Valley Authority; 32 C.F.R. Part 229, Department of Defense.

31. Neither ARPA nor its implementing regulations provide precise definitions of "historic" and "prehistoric." Rather, the emphasis is on the statutory definition of "archaeological resource," which means "any material remains of human life or activities which are of archaeological interest (and) at least 100 years of age." "Archaeological interest" is defined in the uniform regulations as "capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics", and "material remains" is defined as "physical evidence of human habitation, occupation, use, or activity, including the site, location, or context in which such evidence is situated." There follows an extensive list of classes of material remains, which will be considered archeological resources, but it should be understood that the list is not all-inclusive. 18 C.F.R. Part 1312.3 (1984).

32. 16 U.S.C. 470cc(d).

33. 18 C.F.R. Part 1312.4 and 1312.15 (1984).

34. 16 U.S.C. 470ff-gg.

35. For a state-by-state analysis of alternative statutes see Figure 1.

36. Although there is considerable documentation in some Federal agency files, e.g., NPS and USDA Forest Service records, as to Antiquities Act violations, the citations for these violations appear to be the exception rather than the norm. In fact, it is not clear as to how the various agencies have coordinated their activities in order to enforce the Antiquities Act, and there is some confusion as to what has actually constituted a violation. See the NPS Antiquities Act files, WSO, 1969 - 1981, with accompanying correspondence. Thus, a legislative objective for ARPA was to provide improved enforcement authority.

For an anecdotal, yet thorough discussion of ARPA in legislative process, see Janet L. Friedman, "A Drama in Three Acts," and Laura L. Beaty, "ARPA Enacted: The Legislative Process," both in an edition of *American Archaeology* devoted to "A History of the Archaeological Resources Protection Act: Law and Regulations," Vol 5, No.2. 1985, pp. 82 and 90.

Final Uniform Regulations were issued at 43 C.F.R. Part 7 (Department of the Interior), 36 C.F.R. Part 296 (Department of Agriculture), 18 C.F.R. Part 1312 (Tennessee Valley Authority), and 32 C.F.R. Part 229 (Department of Defense), first published at 49 F.R. 1017-1034 (1984); Supplemental Regulations at 52 F.R. 9165-9170 (Department of the Interior) (1987); and amendments to the uniform regulations at 52 F.R. 47720-47722 (1987).

37. P.L. 100-555 and P.L. 100-588 (1988).

38. See, *generally: CRM Bulletin*, Vol. 11, Special Issue: Archeology and the Federal Government, compiled by George S. Smith, Francis P. McManamon, Ronald D. Anzalone, James W. Hand, and James C. Mason, National Park Service, Washington, DC, 1988; *Saving the Past for the Future, Actions for the 90s: Final Report, Two Working Conference on Preventing Archaeological Looting and Vandalism*, Society for American Archaeology, Office of Government Relations, Washington, DC, 1990; and *Federal Archeology Report*, Vol. 3, No. 2, p. 1, National Strategy for Federal Archeology, Secretary of the Interior, 1990.

39. P.L. 89-670, 49 U.S.C. 1651-1659 (1976).

40. The DOTA Section on Preservation of Public Areas (49 U.S.C. 1653(f)) does not specifically define "historic site," but in *Stop H-3 Association v. Coleman* ((1976, CA9 Hawaii) 533 F2d 434, denied 429 US 999, 97 S. Ct. 526, 50 L. Ed 2d 610), the Court held that the determination made by the Secretary of the Interior that a site "may be eligible for inclusion in the National Register of Historic Places" was sufficient to establish historic significance so as to have the site come under the mandates of 49 U.S.C. 1653(f) and 23 U.S.C. 138. Section 1653(f) requires that the Secretary of Transportation "shall cooperate and consult with the Secretaries of Interior, Housing and Urban Development and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. . . with the stipulation that the Secretary of Transportation not approve programs which will require the use of any publicly owned land from. . . an historic site of national, State or local significance."

41. P.L. 91-190, 42 U.S.C. 4321-4361 (1976).

42. 42 U.S.C. 4332(1) of NEPA specifically identifies such considerations for the EIS as "aesthetically and culturally pleasing surroundings. . .preserv[ation] of important historic, cultural and natural aspects of our national heritage . . . and an approach to the maximum attainable recycling of depletable resources."

43. *Ely v. Velde*, 451 F. 2d 1130 (4th Cir. 1971). See also *Stop H-3 v. Brinegar*, 389 F. Supp. 1102, 1110 (D. Hawaii 1974); *Save the Courthouse v. Lynn*, 408 F. Supp. 1323, 1340 (S.D.N.Y. 1975).

44. P.L. 95-341 (1978). Applicable regulations promulgated pursuant to Section 10(a) are located at 43 C.F.R. Part 7.7 and 7.35, regarding ARPA permits. Specific details regarding consultation, permits, and notifications to Indian Tribes are located at 25 C.F.R. Part 262, Protection of Archaeological Resources, Bureau of Indian Affairs. These regulations were proposed on January 25, 1990 (55 F.R. 2580-2583) and are expected to be published in final in 1991.

45. P.L. 89-508, 80 Stat. 309, 4 C.F.R. Part 2.

46. For a detailed treatment of site damage assessment see: D. Lear, "Civil Responsibilities Under the Federal Collections Act of 1966," background paper in *Cultural Resources Law Enforcement*, compiled by P. Davis and D. Green, Second Edition, Forest Service, Southwestern Region, Albuquerque, NM, 1981; also, H. Christensen, K. Mabery, M. McAllister, and D. McCormick, "Cultural Resources Protection: A Predictive Framework for Identifying Site Vulnerability, Protection Priorities, and Effective Protection Strategies," *Symposium Proceedings, Tools to Manage the Past*, edited by J. Tainter and R. Hamre, May 2-6, 1988, Grand Canyon, AZ, pp. 68-80; also Linda F. Carnes, Roy S. Dickens, Jr., Linda France, and Ann Long, *Cost Analysis of Archeological Activities at Eight Southeastern Sites*, National Park Service, Washington, DC, 1986. Regulations for determinations of archeological or commercial value and cost of restoration and repair in penalties assessments for violations of ARPA are located at 43 C.F.R. Part 7.14.

47. Act, March 3, 1875, c. 144 Section 2, 18 Stat. 99; *amendments*: P.L. 93-203, Title VII Section 711(h), (formerly Title VI, Section 611(h)), Dec. 28, 1973; 87 Stat. 882, renumbered P.L. 93-507, Title I Section 101, Dec. 31, 1974, 88 Stat. 1845, added item 665.

48. See *United States v. Gouran* (D. Az. November, 1987).

49. The LOOT Clearinghouse provides case reports relevant to this statute. 18 U.S.C. 1632 also provides penalties for those who aid and abet activities covered under 18 U.S.C. 1631.

50. Statutes such as these do not contain language specifying that artifacts must be found on the property; the language simply authorizes the State "by gift or purchase" to acquire private land that is deemed to be of historic significance. See, for example: Alaska c. 35, s. 41.35.060; or N.M. 18-6-6D and 18-6-10C.

51. A.R.S. 41-865 and A.R.S. 41-866 (effective July 5, 1990). Amendments also were made to the existing public health statutes governing disinterments of dead bodies to harmonize existing law with the new laws (A.R.S. 36-861, effective July 5, 1990).

54. The annual report to Congress on the Federal archeology program is based upon Federal agency responses to a questionnaire distributed at the end of each fiscal year. The most recent publication, *Federal Archeology: The Current Program* (Department of the Interior, Washington, DC, 1988) GPO under number 5/70 024/005/010 57-2), covers activities in fiscal years 1985 and 1986. A draft report, Federal Archeology: 1987 Activities and Results, covering activities through fiscal year 1987 is nearing completion. See Ch. 5, p.2. Statistics for subsequent years have been compiled for use in this Technical Brief.

53. "Four Corners" refers to the place where the State lines of New Mexico, Utah, Colorado, and Arizona intersect. It is an area rich in prehistoric sites from the archeological periods known as Pueblo I, II, and III. Included in these kinds of sites are National Park Service units such as Mesa Verde and Chaco Canyon.

54. Carol A. Bossen, "The Culture Thieves", *Science '86*, July/August, 1986, p.22. See *Problems Protecting and Preserving Federal Archeological Resources*, General Accounting Office Report GAO/RCED-88-8.2, Washington, DC, 1988; and the legislative history for the 1988 amendments to ARPA, House Reports No. 100-701, Pt. 1 (Committee on Interior and Insular Affairs) and Senate Reports Nos. 100-566 and 100-960 (Committee on Energy and Natural Resources).

55. *Federal Archeology: The Current Program*, Ch. 5, p. 30 (1989), and the draft report for fiscal year 1987, Ch. 5, pp 2-3.

56. Examples of such authorities are basic statutes for trespass or cultural properties protection statutes, Federal criminal statutes such as 18 U.S.C. 1361, Damage to Government Property, or National Park Service and USDA Forest Service regulations such as 36 C.F.R. Part 2.1(a)(3)(i), taking of postholds from public land, or 36 C.F.R. Part 2.10(b)(10), camping outside a designated area.

57. In total, the Forest Service, Bureau of Land Management, Fish and Wildlife Service, and National Park Service manage nearly 700 million acres of Federal land.

58. Note 54, page 33.

59. *United States v. Jacques*, CR 83-129-FR (D. Or., 1983), lasting three years. See also, the Channel Islands case listed in the LOOT clearinghouse that began in 1987 and involved more than 20 defendants (See Note 78).

60. Authority for the annual report is provided by the Reservoir Salvage Act of 1960 (P.L. 86-523; 74 Stat. 220, 221; 16 U.S.C. 469) as amended by the Archeological and Historic Preservation Act of 1974 (P.L. 93-291; 88 Stat. 174; 16 U.S.C. 469). Under this Act the Secretary of the Interior is to prepare and submit an annual report to the Congress each fiscal year on the projects, results and costs undertaken in the Federal archeology program. In addition, the National Historic Preservation Act of 1966 (P.L. 89-665; 80 Stat. 915; 16 U.S.C. 470) as amended (P.L. 91-243; P.L. 93-54. P.L. 94-422, P.L. 94-458, P.L. 96-199, P.L. 96-244, P.L. 96-515) requires Federal agencies, to the extent permitted by law and within available funds, to provide information, suggestions, estimates, and statistics to further the purposes of the Act. The report also is mandated by the Federal Land Policy and Management Act of 1976 (P.L. 94-579; 90 Stat. 2743; 43 U.S.C. 1701), which is the primary basis for managing cultural resources on the public lands. Finally, ARPA directs the Secretary of the Interior to provide a separate component of the annual report that deals specifically with its provisions, including the permitted and unauthorized uses of archeological resources on public lands.

61. Briefing Statement, NPS Archeological Assistance Division, January 27, 1989, page 3.

62. The regulations were adopted in February 1984. (See Notes 29 and 30).

63. 16 U.S.C. 470ee *amended at* 102 Stat. 2983 (Nov. 5, 1988).

64. Ibid.

65. 16 U.S.C. 470mm, adding Section 14 to ARPA.

66. Prior to the issuance of ARPA uniform regulations, this section in some cases created a due process problem since there were no mechanisms for the issuance of permits. Therefore, agencies published notices in the Federal Register clarifying that permits pending ARPA regulations would continue to be processed under the applicable sections of the Antiquities Act. Such publication also served as a reminder that ARPA neither amended nor replaced the Antiquities Act. See D. Green, "Prosecuting Under ARPA: What to Do Until the Regulations Arrive," in *Cultural Resources Law Enforcement*, p. 64, note 49.

67. This fourth proof defines the line between a felony and a misdemeanor, the later involving damages of $500 or less. Felony convictions for ARPA violations through 1984 carry a fine of up to $20,000 and two years in prison, or both, for the first offense. After 1984 the Comprehensive Crime Control Act (18 U.S.C. 3623) standardized maximum penalty amounts, allowing up to $100,000 for the first misdemeanor offense, and up to $250,000 for the first felony offense committed by individuals. The respective amounts are doubled when an organization, rather than an individual, has committed the violation. Although ARPA exempts arrowheads from surface collection, such collection is still in violation of the Antiquities Act, except in the Ninth Circuit under *Diaz*, as well as under the Theft of Government Property statute, 18 U.S.C. 641, (See Note 50).

68. In this case, Shumway was found not guilty as to the two felony ARPA counts, but guilty as to destruction of government property.

69. E. Jones and Guevara were sentenced each to 1 year in jail and a $1,000 fine; while T. Jones received an 18-month jail sentence and $1,000 fine.

70. Civil fines based upon site damage assessments were levied in *Brady* (See page 7), but the $38,479.42 was declared uncollectible in 1982. Collection of another civil fine of $18,216 for damage to 11 separate areas in a 1981 case (See LOOT Clearinghouse) was exempted under the Federal Collections Act and declared uncollectible in 1984.

71. See LOOT Clearinghouse case, November, 1981.

72. P. Nickens, S. Lavender, and G. Tucker, Jr., "A Survey of Vandalism to Archaeological Resources in Southwestern Colorado," Bureau of Land Management Cultural Resources Series, No. 11, Denver, Colorado, 1981, pp. 12, 24.

73. These figures are misleading to some extent, since in one case prosecuted under another statute there were a total of 20 defendants. See LOOT Clearinghouse report on the Channel Islands shipwreck case prosecuted under NOAA regulations and the California Penal Code (See Note 70).

74. In the Lower Suwannee digging case (November 5, 1987, LOOT Clearinghouse report) the judge reduced the $200 civil fine on each defendant to $60 "because they didn't find anything."

75. St. Francis National Forest case (January, 1987, LOOT Clearinghouse report).

76. "Shipwreck Looters Fined $132,000 in History's Biggest Case," Channel Islands National Marine Sanctuary Press Release, October 25, 1990. Altogether in this case, 20 individuals were charged with 52 civil and criminal violations of Federal and State laws. The largest single civil fine was $100,000 assessed against the dive boat operator for violating National Oceanic and Atmospheric Administration regulations regarding historic shipwrecks within a National Marine Sanctuary.

77. Lack of access aside, some known offenders will not be detected. Convicted looters and vandals simply move their activities into other States.

78. It is important to note that the second jury trial felony conviction under ARPA occurred in 1990. The "Dry Hill" case involved 10 defendants who looted an unrecorded site in the Cherokee National Forest that contained burial remains of the Eastern Band of the Cherokee. The case resulted in 10 felony convictions, 4 misdemeanor criminal convictions, $5,200.62 assessed in fines, $11,500 ordered in restitution, and prison sentences varying from 6 months to 22 months for some of the defendants. Additional penalties included probationary periods of up to 5 years, with 5 defendants required to provide 300 hours each in community service. All defendants were banned from the National Forest for their respective probationary periods (*United States v. Charlton*, No. 290-73, E.D. Tennessee, October 1990).

79. Among the agencies required to respond are the Bureau of Land Management, Bureau of Reclamation, Fish and Wildlife Service, Mineral Management Service, National Park Service, Territorial and Insular Affairs, Department of Justice, Department of Labor, National Air and Space Administration, National Capital Planning Commission, Pennsylvania Avenue Development Corporation, Tennessee Valley Authority, Federal Aviation Administration, Federal Railroad Administration, Urban Mass Transit Administration, Veterans Administration, Department of Education, Department of Energy, Federal Energy Regulatory Commission, Environmental Protection Agency, Federal Communications Commission, General Services Administration, Department of Health and Human Services, Department of Housing and Urban Development, Bureau of Indian Affairs, Forest Service, Rural Electrification Administration, Soil Conservation Service, Economic Development Administration, the Army, Navy, and Air Force, and the Army Corps of Engineers.

80. Although the Department of Justice audits the 192 United States Attorneys on a monthly basis, there is no section of the audit that references cultural resources crimes.

81. Sometimes a group of LOOT forms accompany the annual report questionnaire, but often these are sent separately to NPS throughout the year.

82. LOOT Clearinghouse, Preliminary Draft prepared for the Society for American Archaeology Anti-Looting Working Conference, Taos, New Mexico, May 7-12, 1989, by the NPS Departmental Consulting Archeologist, Archeological Assistance Division, Washington, DC.

83. The 1988 report on the annual questionnaire from TVA states the frustration: "We have hundreds of sites being looted. We are documenting the destruction, but we are seldom able to document the individuals doing the digging, or how many acts of digging have produced the appalling conditions we document."

[redacted]

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DATE FILMED

07-22-92